Binastra Ablebuild Sdn Bhd v JPS Holdings Sdn Bhd and another case

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24C-161–12 OF 2016 AND WA-24C-171–12 OF 2016
LEE SWEE SENG J
18 AUGUST 2017

Building and Construction Law — Construction contracts — Adjudication — Claimant sought to enforce adjudication decision — Respondent applied to set aside decision — Whether adjudicator had jurisdiction hear case — Whether there was breach of natural justice when adjudicator did not allow extension of time for respondent to serve payment response — Whether adjudicator failed to act independently or impartially — Construction Industry Payment and Adjudication Act 2012 ss 15 & 28

The parties, Binastra Ablebuild Sdn Bhd ('Binastra') and JPS Holdings Sdn Bhd ('JPS') had entered into a construction contract in writing which included the PAM Contract 2006 Form for a project for the construction of a hotel in Puchong, Selangor. Binastra was the contractor, and JPS was the employer of the project. The letter of award was dated 31 October 2014. The contract sum was agreed at RM19,214,765.66. According to Binastra, payments were not made promptly pursuant to the various certificates of payment issued. Binastra served a payment claim on JPS with respect to the architect's certificates of payment Nos 14, 15 and 16 ('said certificates'). At that time, the balance outstanding under the said certificates was about RM2.37m, as claimed in the payment claim. There was no payment response served by the JPS. Binastra proceeded with the adjudication vide a notice of adjudication dated 5 August 2016 which was duly served on JPS on 8 August 2016. Binastra had reduced its claimed sum to RM2,020,419.34 as by then certificate Nos 15 and 16 had been paid. Binastra duly served its adjudication claim. Subsequently, JPS served its adjudication response which: (a) raised a jurisdictional challenge based on the argument that upon determination of the contract, the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') no longer applied; and (b) alleged set off/counterclaim against Binastra's claim for the first time. By Originating Summons No WA-24C-161–12 of 2016 ('Binastra's application'), Binastra sought to enforce an adjudication decision as a court judgment against JPS under s 28 of the CIPAA. JPS then by Originating Summons No WA-24C–171–12 of 2016 ('JPS's application') applied to set aside the adjudication decision. JPS in the setting aside application relied on the following grounds: that the adjudicator exceeded his jurisdiction, or breached the rules of natural justice, or failed to act independently or impartially under s 15(b), (c) and (d) of the CIPAA.

Held, dismissing JPS's application and allowing Binastra's application with cost of RM10,000 to be paid to Binastra:

(1) The adjudicator clearly had jurisdiction to hear the dispute as this was not a case where the parties had arrived at a settlement resulting in s 37(3) of the CIPAA being triggered, bringing the adjudication to an end. Being a jurisdictional issue raised for the first time in this setting aside application, the court was at liberty to hear it afresh without being fettered by any finding of fact of the adjudicator. There was no settlement agreement arrived at where Binastra was not allowed to proceed with the notice to adjudicate. Neither had there been a settlement agreement arrived at where, if adjudication had been proceeded with, JPS was to withdraw the adjudication claim under s 17(1) of the CIPAA or to terminate the adjudication proceedings pursuant to s 37(3) of the CIPAA (see paras 51–52).

(2) From the rational and perspectives of the CIPAA, there was no good reason to exclude its application once a construction contact had been terminated. It would be dangerous to conclude from silence that Parliament had not intended the CIPAA to apply once the contract was terminated; whether by the contractor or the employer, for then the full and final resolution of all disputes was better resolved at arbitration when the final account was ready. The adjudicator therefore had jurisdiction to decide the dispute even though the contract had been terminated (see paras 59, 66 & 73).

(3) The application of natural justice did not require the adjudicator to decide an issue in particular manner. All that required under natural justice was that the adjudicator should hear from both sides and came to a determination in the issue. The fact that he had made a decision favouring a party and not on the other party was not a justification that he had breached natural justice. It was doubtful if an adjudicator had the power to extend the time for service of a payment response as this was a matter to be complied with and served before his appointment as an adjudicator. His power to extend time under s 26 of the CIPAA must be over matters in which he had the jurisdiction under s 27 of the CIPAA. If he had no jurisdiction over a matter because no payment response was filed, he could not have the power to extend time to enable him to have jurisdiction over such a matter (see paras 80 & 88).

(4) It would be most unfair for JPS to level an accusation that the adjudicator failed to act independently or impartially merely because JPS disagreed with the adjudicator and strongly believed that the adjudicator's decision was wrong in law. Unless there was cogent and convincing evidence of such lack of independence or impartiality, the court would not venture into accusations of this nature where it was easy to allege but with no evidence raised to point in that direction other than the JPS's failure to

understand how the adjudicator could have disagreed with the stand that learned counsel for JPS had taken (see paras 99–100).

[Bahasa Malaysia summary

Pihak-pihak, Binastra Ablebuild Sdn Bhd ('Binastra') dan JPS Holding Sdn Bhd ('JPS') telah menandatangani satu kontrak pembinaan secara bertulis termasuklah PAM Contract Form 2006 untuk satu projek pembinaan sebuah hotel di Puchong Selangor. Binastra merupakan kontraktor dalam projek tersebut manakala JPS merupakan majikan. Surat award bertarikh pada 31 Oktober 2014. Jumlah keseluruhan kos adalah berjumlah RM19,214,765.66. Binastra mengatakan bahawa bayaran tidak dibuat dengan sempurna berdasarkan kepada pelbagai pengesahan pembayaran yang dikemukakan. Binastra telah menyampaikan satu tuntutan bayaran kepada JPS berpandukan pengesahan bayaran daripada artiket bernombor 14, 15 dan 16 ('pengesahan-pengesahan tersebut'). Pada ketika itu, baki tunggakan bayaran adalah berjumlah RM2.37 juta sepertimana yang dituntut dalam tuntutan pembayaran. Tiada maklum balas daripada JPS berkenaan dengan tuntutan yang dibuat. Binastra kemudiannya melakukan adjudikasi dengan membuat penyampaian notis adjudikasi yang bertarikh 5 Ogos 2016 kepada JPS pada 8 Ogos 2016. Binastra telah mengurangkan jumlah tuntutan bayaran kepada RM2,020,419.34 setelah adanya pembayaran dilakukan melalui pengesahan pembayaran No 15 dan 16. Binastra kemudian telah melakukan penyampaian adjudikasi tersebut. JPS kemudiannya melakukan adjudikasi penyampaian balasan dengan mengemukakan isu-isu berikut: (a) dengan adanya pelaksanaan kontrak akan menyebabkan CIPAA 2012 tidak terpakai; dan (b) membuat tuntutan balas buat kali pertama tehadap tuntutan pembayaran yang dibuat oleh Binastra. Melalui Saman Pemula No WA-24C-161-12 Tahun 2016 ('permohonan Binastra'), Binastra memohon satu penguatkuasan keputusan adjudikasi dijadikan sebagai satu penghakiman mahkamah terhadap JPS di bawah s 28 CIPAA. JPS kemudiannya, melalui Saman Pemula No WA-24C-171–12 Tahun 2016 ('permohonan JPS') telah memohon untuk mengenepikan keputusan adjudikasi tersebut dengan alasan: adjudikator telah bertindak melebihi bidang kuasa, adjudikator telah melanggari prinsip keadilan semula jadi, atau kegagalan adjudikator bertindak secara berkecuali di bawah s 15 (b), (c) dan (d) CIPAA.

Diputuskan, menolak permohonan JPS dan membenarkan permohonan Binastra dengan kos RM10,000 dibayar kepada Binastra:

(1) Adjudikator dengan jelas mempunyai bidang kuasa untuk mendengar permasalahan ini di mana pihak-pihak telah mencapai persetujuan di bawah s 37(3) CIPAA, ianya tidak bermaksud adjudikasi telah berakhir. Dengan pertama kalinya isu bidang kuasa dibangkitkan dalam mengenepikan permohonan ini, mahkamah mempunyai bidang

kebebasan untuk mendengar isu ini tanpa dipengaruhi oleh dapatan fakta-fakta oleh adjudikator. Tiada apa-apa persetujuan penyelesaian dicapai oleh kedua-dua pihak. Sekiranya terdapat persetujuan penyelesaian sekalipun, JPS boleh menggunakan adjudikasi sama ada untuk mengenepikan tuntutan adjudikasi tersebut di bawah s 17(1) CIPAA atau menamatkan prosiding adjudikasi di bawah s 37(3) CIPAA (lihat perenggan 51–52).

(2) Daripada perspektif dan rasional CIPAA, tiada alasan yang baik untuk mengecualikan pemakaian adjudikasi pada ketika kontrak pembinaan telah ditamatkan. Adalah tidak munasabah untuk merumuskan daripada ketiadaan peruntukan tersebut bermaksud Parlimen tidak berniat untuk menguna pakai CIPAA ketika kontrak telah ditamatkan, sama ada oleh kontrakor ataupun daripada majikan; penyelesaian permasalahan secara penuh dan akhir adalah lebih baik diputuskan secara arbitrasi pada ketika adanya akaun terakhir (lihat perenggan 59, 66 & 73).

(3) Permakaian prinsip keadilan semula jadi tidak memerlukan adjudikator untuk memutuskan sesuatu isu secara khusus. Apa yang diperlukan dalam prinsip keadilan semula jadi adalah adjudikator perlu mendengar daripada kedua-dua belah pihak dan membuat keputusan terhadap isu-isu yang dibangkitkan. Fakta di mana adjudikator membuat keputusan memihak kepada salah satu pihak adalah tidak bermaksud adanya pelanggaran prinsip keadilan semula jadi. Adalah meragukan sekiranya adjudikator mempunyai kuasa untuk melanjutkan masa untuk melakukan penyampaian respon pembayaran kerana perkara ini perlulah dipatuhi dan disampaikan sebelum adjudikator dilantik. Kuasa adjudikator untuk melanjutkan masa adalah berlebihan daripada bidang kuasa sepertimana dalam s 27 CIPAA. Sekiranya adjudikator tidak mempunyai kuasa disebabkan tiada respon pembayaran difailkan, adjudikator sememangnya tidak mempunyai kuasa untuk melanjutkan masa (lihat perenggan 80 & 88).

(4) Adalah tidak adil bagi JPS untuk melabelkan adjudikator gagal bertindak secara berkecuali dan adil hanya kerana JPS tidak bersetuju dengan adjudikator dan mempercayai bahawa keputusan adjudikator adalah salah di sisi undang-undang. Melainkan sekiranya ada bukti-bukti yang menunjukkan berlakunya ketidakadilan, mahkamah tidak akan mengambil kira tuduhan ini hanya disebabkan oleh kegagalan JPS memahami keputusan yang dibuat oleh adjudikator yang tidak bersetuju dengan pendapat peguam terpelajar yang mewakili JPS (lihat perenggan 99 & 100).]

Notes

For cases on construction contracts in general, see 1(3) *Mallal's Digest* (5th Ed, 2015) paras 4218–4226.

Cases referred to

ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal [2016] MLJU 1776, CA (refd)
Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd [2013] 3 SLR 609, HC (distd)
Amec Capital Projects Ltd v Whitefriars City Estates Ltd [2004] EWCA Civ 1418, CA (refd)
Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd [2016] 7 MLJcon 119; [2015] 4 AMR 565, HC (refd)
Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWHC 778 (refd)
Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358, CA (refd)
Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case [2017] 7 MLJ 732; [2016] 5 CLJ 882, HC (refd)
Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd [2016] MLJU 1051; [2017] 1 CLJ 101, HC (refd)
Shepherd Construction Ltd v Mecright Ltd [2000] BLR 489, QBD (distd)
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2016] 6 MLJ 717; [2017] 1 CLJ 677, CA (refd)
View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd [2015] MLJU 695, HC (refd)

Legislation referred to

Architects Act 1967 s 7A
Architects Rules 1996 r 23
Construction Industry Payment and Adjudication Act 2012 ss 3, 5, 6, 6(4), 8, 8(1), 13(c), 15, 15(b), (c), (d), 17(1), 25(p), 26, 26(2), 27, 27(1), (2), 28, 37, 37(3)

MK Chen (K Ganeson and Low Kien Seng with him) (MK Chen & Leong) in Originating Summons No WA-24C-161–12 of 2016 for the plaintiff.
Sanjay Mohan (Wong Li Wei with him) (Thangaraj & Assoc) in Originating Summons No WA-24C-171–12 of 2016 for the plaintiff.
MK Chen (K Ganeson and Low Kien Seng with him) (MK Chen & Leong) in Originating Summons No WA-24C-171–12 of 2016 for the defendant.
Sanjay Mohan (Wong Li Wei with him) (Thangaraj & Assoc) in Originating Summons No WA-24C-161–12 of 2016 for the defendant.

Lee Swee Seng J:

[1] By Originating Summons No WA–24C–161–12 of 2016 ('the enforcement application'), Binastra Ablebuild Sdn Bhd ('Binastra') sought to enforce an adjudication decision as a court judgment against JPS Holdings Sdn Bhd ('JPS') under s 28 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA').

A **[2]** As is not uncommon, the party against whom the adjudication decision is given would apply to set aside the adjudication decision especially when served with an application for enforcement of the said decision. JPS by Originating Summons No WA–24C-171–12 of 2016 ('the setting aside application') applied to set aside the adjudication decision. Parties agreed that
B both the applications should be heard together as one is the flip side of the other. Generally if an adjudication decision is set aside then invariably there would be no decision to enforce and the enforcement application would be dismissed.

C **[3]** The focus thus would be on the setting aside application as in whether JPS has valid grounds to set aside the adjudication decision. The parties shall be referred to as claimant and respondent in the said adjudication or sometimes as Binastra and JPS respectively.

D PROJECT

[4] The parties had entered into a construction contract in writing which included the PAM Contract 2006 Form for a project for the construction of a
E hotel in Puchong, Selangor. The claimant was the contractor, and JPS the employer, of the project. The letter of award was dated 31 October 2014. The contract sum was agreed at RM19,214,765.66.

[5] According to the claimant, payments were not made promptly pursuant
F to the various certificates of payment issued. Binastra as claimant served a payment claim on JPS with respect to the architect's certificates of payment Nos 14, 15 and 16 ('said certificates').

G **[6]** At that time, the balance outstanding under the said certificates was about RM2.37m, as claimed in the payment claim.

[7] There was no payment response served by the respondent, JPS.

H **[8]** The claimant proceeded with the adjudication vide a notice of adjudication dated 5 August 2016 which was duly served on the respondent on 8 August 2016. The claimant had reduced its claimed sum to RM2,020,419.34 as by then certificates 15 and 16 had been paid.

I **[9]** The claimant duly served its adjudication claim. subsequently, the respondent served its adjudication response which: (a) raised a jurisdictional challenge based on the argument that upon determination of the contract, CIPAA no longer applies; and (b) alleged set off/counterclaim against the

claimant's claim for the first time. The set off/counterclaim is for the LAD claim for late completion by the claimant and also for the costs of the rectification works.

[10] In the adjudication reply served the claimant had revised the claim to RM625,800.92 as the balance sum due and payable under certificate No 14 after taking into consideration further payments made to NSCs direct on behalf of the claimant and also the fact that certificates 15 and 16 had been fully paid before the notice of adjudication was served.

PROBLEM

[11] By way of separate letter, the respondent made an application for extension of time to serve a payment response containing the set off/ounterclaim. The purpose of the application was to extend the jurisdiction of the adjudicator to those matters.

[12] The claimant objected to the said application for extension of time to serve a payment response.

[13] The adjudicator dismissed the respondent's jurisdictional challenge. He also disallowed the respondent's application for an extension of time to serve a payment response, thereby excluding the respondent's set off and counterclaim. On 5 December 2016 he allowed the claimant's claim for the balance sum of RM625,800.92 ('adjudicated sum') as there were further part-payments made by the respondent on behalf of the claimant to the NSCs. The adjudicated sum was to be paid on or before 15 December 2016. The adjudicator also awarded interest of 5%pa on the adjudicated sum from 22 April 2016 until full payment or settlement of the adjudicated sum. Finally the respondent was also to pay the claimant the sum of RM40,717.97 being the costs of the adjudication proceedings.

PRAYERS

[14] The respondent in the setting aside application relied on the following grounds: that the adjudicator exceeded his jurisdiction, or breached the rules of natural justice, or failed to act independently or impartially under s 15(b),(c) and (d) of the CIPAA.

PRINCIPLES

[15] Lest it be forgotten, it must be stated again that it is not the function of the courts to review merits of an adjudication decision, or the correctness of it. The Court of Appeal in *ACFM Engineering & Construction Sdn Bhd v Esstar*

Vision Sdn Bhd and another appeal [2016] MLJU 1776 was very clear on this.

[16] The courts will intervene only in *very exceptional* circumstances, which are far and few in between. The prima facie stand of the courts is to affirm the adjudicator's decision, unless the aggrieved party can show that the grounds stated in s 15 of the CIPAA apply.

[17] The approach of the courts is to *facilitate* regular and timely *payment*, and *not* to be engaged in dilatory and abusive applications to oppose the award, per Hamid Sultan Bin Abu Backer, JCA in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2016] 6 MLJ 717 at p 736; [2017] 1 CLJ 677 at p 697, para 15.

Whether the adjudicator has jurisdiction to hear the matter by virtue of the handwritten notation of 18 July 2016 whereby the parties agreed, after a payment claim has been served, to extend time to settle payments due and owing under certificates 14, 15 and 16 subject to terms

[18] Learned counsel for the respondent argued that the adjudicator had no jurisdiction to hear this dispute as the payment claim was subsumed into a handwritten notation and agreement dated 18 July 2016 which was entered into by the parties two working days after the payment claim was served by the claimant on the respondent on 14 July 2016. It was further argued that in the light of the said handwritten notation dated 18 July 2016, the payment claim was redundant, inoperative and void in law. It was further submitted that the dispute referred in the payment claim and notice of adjudication are not disputes that can be referred to adjudication in light of the handwritten notation dated 18 July 2016.

[19] The rough and rudimentary handwritten notation is set out below for a fuller appreciation of the terms that parties had agreed:

"As agreed below:

1) Claim 15 – RM 274,286.68
2) Claim 16 – RM 82,536.79

To be settled by 20/7/2016 by JPS

3) Claim 14 – Balance sum of RM 625,600.92 – will be settled by 20/8/2016 by JPS

4) Temporary water supply will be continued to provide.

5) Temporary electricity supply will be continued to provide.

6) Scaffolding will be continued to provide.

7) Binasatra Ablebuild Sdn Bhd will agree to sign all relevant documents for CCC compliance."

[20] The context of the handwritten notation is relevant. It was after the claimant had on 8 July 2016 issued a notice pursuant to cl 26.2 of the PAM Form contract and proceeded to terminate the contract. The ground for termination was for non-payment on the certificates of payment due. In a meeting held on 18 July 2016 to resolve matters, it was agreed that the respondent shall make payments under certificate Nos 14, 15 and 16 without any deduction for the payment of LAD and costs for rectification of defects provided the water supply, electricity supply and scaffolding will continue to be provided and that the claimant will sign all relevant documents for CCC compliance.

[21] The respondent contended that, as a matter of law, by this handwritten notation, the claimant had effectively agreed to waive all its rights which may have accrued to it prior to the entry of this agreement.

[22] If truly the claimant had agreed not to proceed with the adjudication with the conclusion of this handwritten notation, then one would have expected the handwritten notation to make reference to the claimant agreeing not to proceed with the notice of adjudication under s 8 of the CIPAA.

[23] As there was none one would have expected the respondent to serve a payment response either admitting to the payment claim or so much of it as agreed in the handwritten notation and disputing the balance if any. The last day to serve the payment response was 28 July 2016. However none of that was forthcoming.

A **[24]** Be that as it may, the respondent's position is not prejudiced in any way as under s 6(4) a non-paying party who fails to respond to a payment claim is deemed to have disputed the entire payment claim.

B **[25]** Here one must distinguish between an amount that is already due and owing and an amount that is to be settled at a later date by consent. From the PAM contract, certificates Nos 14, 15 and 16 were already due for payment but parties had agreed to a later date for settlement of the amount due and owing.

C **[26]** If parties had intended the postponement of the cause of action then that must be specifically brought to the attention of the claimant by the respondent. Otherwise the claimant is entitled to proceed but shall not execute on the agreed amounts due until the postponed dates for payments are up.

D **[27]** It is not unlike a case where in a writ action a plaintiff has sued for a sum owing for work done and then before defence is filed the defendant and the plaintiff agreed to a postponed date where the sums owing would be paid in full. As the cause of action has arisen to sue for the amount owing, the plaintiff is perfectly entitled to record either a consent judgment reflecting a future date
E of payment or to take judgment for the balance sum if by the time judgment is taken the balance sum is still not paid by the postponed date of payment. There is no necessity to withdraw the writ unless that is a term of the settlement and it cannot be said that the plaintiff's cause of action has been extinguished unless it is expressly provided in a settlement agreement which is in the nature of a full
F and final settlement such that any dispute or breach will only require parties to sue on the settlement agreement.

[28] There is merit in the claimant's submission that there is no mention in
G the handwritten notation of the expression 'full and final settlement' of the said certificates. Indeed there cannot be as the certified sums concerning the NSCs works were not included. Neither did the handwritten notation require the claimant to withdraw its payment claim or to undertake not to proceed with a notice of adjudication.

H

[29] The payments for the agreed sums under certificates Nos 15 and 16 were duly made on 20 July 2016. On 26 July 2016 the claimant wrote to inform the respondent that it reserved its rights on the payment claim and the outstanding sums under the said certificates which claim shall not be
I prejudiced by the above payments on 20 July 2016. The respondent did not refute the claimant's assertion and reservation of rights. The respondent at that time still had until 28 July 2016 to serve its payment response but chose, for reason best known to itself, not to serve its payment response.

[30] The claimant then proceeded with what it understood to be within its legal rights, ie to serve its notice of adjudication dated 5 August 2016 on the respondent on 8 August 2016. The amount claimed in the said notice of adjudication was reduced by the payments of the first two amounts paid on 20 July 2016.

[31] The respondent failed to pay the third amount of RM625,800.92 as agreed for certificate No 14 by 20 August 2016. The respondent disputed its liability to pay the third amount only after it had defaulted on 20 August 2016 and after the claimant had demanded payment.

[32] As narrated by the claimant, notwithstanding its alleged dispute, the respondent through its parent company, Plus Degree, continued to pay parts of the said certificates to the NSCs, even up until 7 September 2016.

[33] The claimant only came to know of these payments made direct to the NSCs when it was adduced in the adjudication response subsequently. It was only after the respondent had defaulted on the third payment on the due date of 20 August 2016 that the claimant wrote to the KLRCA to appoint an adjudicator by its letter of 26 August 2016.

[34] The first time the respondent raised the issue of jurisdiction was in the adjudication response served dated 4 November 2016 which is three months after being served with the notice of adjudication. However the jurisdictional issue was with respect to whether the adjudicator has jurisdiction to proceed with the adjudication once the contract has been terminated.

[35] It was not on the jurisdictional issue that there was settlement of all outstanding claims with the result that there was nothing to adjudicate on and that the adjudication ought to have terminated by virtue of s 37(3) of the CIPAA.

[36] There are valid grounds for the claimant's argument that the handwritten notation is not a full and final settlement where both parties withdraw pending claims against each other in the adjudication and that both parties shall not have any claims against the other.

[37] For all intents and purposes, the settlement so-called was a temporary roadmap forward for the parties to explore an amicable solution in the light of the anticipated opening of the hotel in September 2016 where as the respondent said the staff, already employed from July 2016, were all ready to start work to welcome the guests. Indeed in the respondent's reply dated 2 September 2016 to the claimant's letter of 26 July 2016, the respondent themselves acknowledged as follows:

A

> ... the terms as stated in the hand written notation dated 18th July 2016 of which we had agreed to pay you without any deductions of LAD. *However these payments are made strictly without prejudice to our rights to claim for LAD*. (Emphasis added.)

B

[38] The respondent in the adjudication response served, claimed for the amount due as LAD and for the costs of rectification works. Clearly the respondent had not abandoned their rights to make such a claim, consistent with their letter of 2 September 2016 highlighted above.

C

[39] This is further reinforced by the respondent's letter to the claimant dated 6 October 2016. somewhat exasperated by the numerous letters from the claimant reiterating their position, the respondent wrote as follows:

> We also refer to the Adjudication filed by you against us which is now pending the acceptance of appointment of the Adjudicator.
>
> ...
>
> As all the issues raised by you will be determined in the Adjudication or arbitration proceedings, we write to inform you to put an end to this ongoing correspondence of reiterating your position repeatedly when these issues should be raised in the Adjudication or arbitration proceedings.

D

E

[40] Nowhere in the correspondence of the parties nor in the adjudication response filed nor in any letters to the adjudicator had the respondent raised the issue of jurisdiction in the sense that the parties had fully and finally settled all the claims against each other and that a settlement having been reached, the adjudicator had no jurisdiction to continue with the adjudication.

F

[41] The position taken by the respondent themselves in the adjudication response served at para 28 reads as follows:

G

> 28. Under this arrangement, *the Respondent whilst reserving the Respondent's rights under the Contract to claim LAD*, had agreed to release the payments held under Progress Certificates No. 14, 15 and 16 provided the Claimant continues to complete the rectification of the defective works. (Emphasis added.)

H

[42] This is not a case under s 37(3) of the CIPAA which reads:

> An adjudication proceeding is terminated if the dispute being adjudicated is settled by agreement in writing between the parties or decided by arbitration or the court.

I

[43] Not only did the learned counsel for both sides not refer to this section in their submissions before this court but there was also no reference in the correspondence of the parties with each other and with the adjudicator; the focus of the jurisdictional challenge being that of the adjudicator having no jurisdiction because the contract had been terminated.

[44] Of course the respondent is at liberty to raise this jurisdictional challenge at this stage of setting aside the adjudication decision but the fact that it was not raised at the adjudication would be more in the nature of a Freudian slip in that the respondent was not labouring under a misconception that the handwritten notation was meant to be a full and final settlement of the parties' claim against each other.

[45] To put it very simply it was a case where the parties agree that sums due and owing under the three certificates shall be settled by a certain future date.

[46] One can also view the handwritten notation from the perspective taken by the respondent in that the claimant is said to have reneged from it by introducing additional terms with respect to the signing of the relevant documents for the CCC. The respondent had stated in their letter of 2 September 2016 as follows:

> ... It now appears that you have taken the position that the contract has been determined and you will only apply for CCC upon final payment or final account payment.
>
> Surely that cannot be the case as you are fully aware that the documents relating to CCC will have to be signed immediately upon completion and it was not agreed at the meeting that the relevant documents relating to the CCC will be signed upon final payment or final account payment as it will take a considerable amount of time to settle the final account. It is clear that you have breached the terms of the agreement reached between the parties on 18th July 2016.
>
> ...
>
> Since you have reneged on what was agreed at the Meeting and you have now proceeded with the adjudication process, you have no basis to claim for the sum of RM625,800.92 as this amount will be used to set off with LAD and damages for the delay in the completion of the project.

[47] As can be seen, in the final analysis, the respondent was prepared to take the position that there was no settlement as the terms have been breached by the claimant and that the parties shall proceed with the adjudication.

[48] Learned counsel for the respondent referred to the decision of the Singapore High Court in *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 in support of the proposition that where there is a settlement agreement then the adjudicator has no jurisdiction to hear the claim. The facts in *Admin Construction* can be distinguished from our present case as there it was clearly stated the settlement agreement is a 'full and final settlement' of the claims. The operative clause of the settlement agreement reads as follows at para 23:

> We, Vivaldi (S) Pte Ltd, do hereby irrevocably and unconditionally agree with and accept the sum of S$165,271.80 ... and a further S$34,125.00 ... being retention as shown herein being the *full and final settlement for all the Works under the Sub-Contract*.
>
> We further confirm that we have no further claims whatsoever arising out of any matters whether covered by this Sub-Contract or otherwise and *all Final Account [sic] issued earlier if any, shall be superseded by this Statement of Final Account*. (Emphasis added.)

[49] The Singapore High Court observed as follows:

> 31. As noted above, the Settlement Agreement is ex facie, valid and binding on parties and since Vivaldi has not taken any steps to set it aside, accordingly, as at 28 December 2011, the date of Vivaldi's application, all disputes that existed between the parties on or before 31 January 2011 were extinguished. There was therefore no dispute as at 28 December 2011 in relation to the Third PC capable of being referred to adjudication and Vivaldi had no right to apply for adjudication in relation to the Third PC.
>
> 32. It follows that the Adjudicator had no authority or jurisdiction to deal with the adjudication application of 28 December 2011. Consequently, I find that the Adjudicator had no jurisdiction to hear the dispute, and the determination rendered by the Adjudicator must be set aside.

[50] In our case the parties have expressly reserved and preserved their rights under the contract.

[51] The adjudicator clearly has jurisdiction to hear the dispute as this is not a case where the parties have arrived at a settlement resulting in s 37(3) of the CIPAA being triggered, bringing the adjudication to an end.

[52] Being a jurisdictional issue raised for the first time in this setting aside application, this court is at liberty to hear it afresh without being fettered by any finding of fact of the adjudicator. My conclusion as stated is that there was no settlement agreement arrived at where the claimant is not allowed to proceed with the notice to adjudicate. Neither has there been a settlement agreement arrived at where, if adjudication had been proceeded with, the respondent is to withdraw the adjudication claim under s 17(1) of the CIPAA or to terminate the adjudication proceedings pursuant to s 37(3) of the CIPAA.

[53] It was a finding of fact at para 13.4.6 of the adjudication decision that the outstanding sum of RM625,800.92 was admitted by the respondent in their adjudication response. As pointed out by the adjudicator the reason given by the respondent for not paying was because of the alleged set offs, cross-claims and/or counterclaim. Paragraph 42 of the adjudication response served by the respondent is as clear as crystal:

42. Therefore, *based on the terms of the Contract and the agreement between the parties*, there are no payments which are due and payable under Progress Certificates No 15 and 16 whilst under Progress Certificate No 14, *the only outstanding amount is RM625,800.92 which is a subject matter of set-off, cross-claim and/or counterclaim*.

...

47. The Respondent contends that the amount of set-off, cross-claim and/or counter-claim which the Respondent has against the Claimant is in excess of the balance certified sum of RM625,800.92 under Progress Certificate No 14 or any other alleged claim of the Claimant under Progress Certificates No 14, 15 and 16. (Emphasis added.)

[54] The English decision in *Shepherd Construction Ltd v Mecright Ltd* [2000] BLR 489 can be distinguished because there the Technology and Construction Court held that the settlement agreement had superseded the construction contract such that if there were still any disputes arising out of the settlement agreement, parties may sue on it but not to pursue adjudication because there was nothing left of the construction contract to adjudicate.

[55] This is to be contrasted with our present case where as can be seen in para 42 of the adjudication response the respondent had based their defense and set off/cross-claim or counterclaim on the lad clauses in the main contract.

[56] At any rate the respondent had taken the stand that the handwritten notation terms had been breached by the claimant and is no longer binding on the parties and that consistent with the parties preserving their respective rights, they are both proceeding with the adjudication. The respondent is estopped from resiling from that position to now insist that there was a full and final settlement in the handwritten notation.

[57] As to whether the respondent's set off of LADs and rectification works should be allowed is a matter that had to be decided by the adjudicator based on whether it was properly raised before him since there was no payment response filed. This shall be discussed shortly.

Whether the adjudicator has jurisdiction to hear the matter if the contract has been terminated

[58] The respondent had raised in their adjudication response in para B.1 that once the contract was terminated, the CIPAA could no longer apply as the contractual provisions in terms of payment were no longer operative. The respondent further contended at para B.2 that upon determination, parties are to conduct a joint inspection and proceed with the final accounts.

[59] From the rationale and perspective of CIPAA, there is *no* good reason to

exclude its application once a construction contract has been terminated. The court has addressed this issue in *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case* [2017] 7 MLJ 732; [2016] 5 CLJ 882 as follows:

> [56] From the rationale and purpose perspective of the CIPAA, there is no good reason to exclude its application once the construction contract has been terminated. The long title to the CIPAA sets out its preamble and captures in a concise statement the prophylactics purpose of the Act which is to:
>
> > ... to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.
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> [57] Regard may also be had to the explanatory statement to the Bill of Construction Industry Payment And Adjudication Act 2012 which reads:
>
> > The Construction Industry Payment Adjudication Act 2012 ('the proposed Act') seeks to *facilitate regular and timely payment in respect of construction contracts* and to provide for speedy dispute resolution through adjudication. The purpose of the proposed Act is to *alleviate payment problems that presently prevails pervasively and which stifles cash flow in the construction industry.* The proposed Act further provides default payment terms in the absence of provisions to that effect and *prohibits conditional payment terms that inhibit cash flow.* The Act also seeks to *provide remedies for the recovery of payment upon the conclusion of adjudication*. (Emphasis added.)
>
> [58] Unscrupulous contractors would have a predilection to terminate a construction contract if that has the potent effect of preempting adjudication and with that a need to make payments forthwith on the pain of execution. Of course, any wrongful termination would finally result in damages to be paid, but that can wait for some contractors, for so long as his current cash flow is not adversely affected. That would skirt the application of CIPAA at a time when it is needed most by the claimant for survival when without the cash flow for work done, it would be suffocating and the claimant may have to slow down, suspend or even stop work altogether.
>
> [59] The issue had been raised in Singapore under their SOPA in *AU v AV* [2006] SGSOP 9, where a construction contract was terminated and a claim was made under SOPA. Philip Jeyaretnam SC concluded that he had jurisdiction under SOPA to hear the claim. His reasoning was as follows:
>
> > [13] I also noted to both counsel in the course of the hearing that while the New South Wales Act expressly included within the definition of 'progress payment' 'the final payment for construction work carried out', our Act did not. Nonetheless, I am of the view that *the Act does apply even after a contract is terminated. First, the intention to protect cash flow would not be achieved if the interpretation put forward by the Respondent is adopted. If cash flow is blocked on one project, that will affect a contractor or service provider's financial resources for other projects.* Secondly, although one always speaks of termination of a contract when it is really the right and obligation to do work and be paid for it which is terminated for the future, the *contract continues to govern the relationship between*

the parties in relation to the work already done.

[60] It was conceded that there are authorities in England that suggest that an adjudicator can still proceed with an adjudication and produce his 'determination' even if the underlying construction contract has been terminated. This line of authorities, it was submitted, were premised on the provision of the English Act that provides that the adjudication can be proceeded 'at any time' (see s 108(2)(a) of the Housing Grant Construction and Regeneration Act 1996 [UK] ('the HGCRA').

[61] However the rationale set out in *A & D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd* [1999] Lexis Citation 3443; [2000] 16 Const LK 199 QBD (TCC) is clear. There Wilcox J of the UK Technology and Construction Court observes as follows:

> 18. Even if the contract had been terminated, the matters referred to the adjudicator remain disputes under the contract. Where there is a contract to which the Act applies, as in this case, and there are disputes arising out of the contract to be adjudicated, the adjudication provisions clearly remain operative just as much as an arbitration clause would remain operative.
>
> 19. Had it been the intention of Parliament to limit the time wherein the party could give notice of his intention to refer a matter to adjudication, in the exercise of his right under s 108(1), it could have imposed a clear limit. Precise limits as to the appointment of Adjudicators and the time tabling of the process of adjudication are clearly set out in the Scheme. By contrast there is no such limitation under the Act or the Scheme as to when a notice of intention to refer a matter to adjudication may be made. By analogy, with arbitration provisions, there is clear authority to the proposition that those terms governing reference to arbitration survive the determination of the contract. See *Heyman v Darwins Ltd* [1942] AC 356; [1942] 1 All ER 337. Doubtless the position in relation to arbitration was in the minds of the legislators when the clear words of s 108 were enacted.

[62] For the reasons given above, I am not inclined to follow the contrary position taken by the Queensland Supreme Court in holding that upon the termination of a contract, the adjudicator has no jurisdiction to adjudicate on an outstanding claim as exemplified in *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd* [2013] QSC 223 and *McNab NQ Pty Ltd v Walkcrete Pty Ltd & Ors* [2013] QSC 128.

[60] Here is a case where the claimant as contractor had exercised its rights to terminate the contract under cl 26.2 for default in the respondent to honor the certificates of payment Nos 14 and 15 on their due dates. After the expiry of 14 days the claimant issued and served on the respondent a notice of determination of employment and termination of contract dated 8 July 2016.

[61] The respondent is now saying by para 3 of its adjudication response that the correct approach is for the parties to proceed with arbitration proceedings after the finalisation of the final accounts as provided under the contract and it

is improper for all outstanding matters and ongoing matters to be decided summarily in an adjudication proceeding under CIPAA.

[62] On the other hand the respondent had admitted in its letter of 2 September 2016 to the claimant that the claimant should not insist on signing the relevant documents relating to CCC only upon the final payment or final account payment as 'it will take a considerable amount of time to settle the final account'.

[63] Whilst I accept that any disputes on the final accounts may be referred by the employer to arbitration under cl 26.6 (b) in the case of determination of employment by the contractor under cl 26 of the contract, that is not to say that the claimant as contractor cannot avail itself of its right to adjudication for certificates already due for payment.

[64] To deprive the claimant such a statutory right for a speedy resolution of the dispute would be to visit the claimant with a double whammy; on the one hand it was precisely for non-payment that the claimant was constrained to terminate the contract and on the other hand the claimant is barred from pursuing a speedy claim in adjudication until the final account is finalised and the employer disputes the final account and refers the matter to arbitration.

[65] That would be to defeat the purpose of CIPAA altogether and it might as well be declared loud and clear that CIPAA is not available to a contractor who terminates the contract even for lawful grounds. If that had been the intention of Parliament on a matter of such serious ramifications, it could easily have added such a provision under s 3 on 'Non-application'.

[66] It would be dangerous to conclude from silence that Parliament had not intended CIPAA to apply once the contract has been terminated, whether by the contractor or the employer, for then the full and final resolution of all disputes is better resolved at arbitration when the final account is ready. It would be a case where when CIPAA is most needed to solve the contractor's problem of non-payment by the employer that its prophylactic properties are not available until final account is prepared which the employer here admits that it would take a considerable time.

[67] Whilst there may be issues that may be more fully ventilated and resolved finally in arbitration, the statutory right to adjudication must be promoted and preserved if the purpose of CIPAA to facilitate regular and timely payment and to provide for speedy dispute resolution through adjudication is not to be thwarted. Adjudication yields a result of interim finality and merely because arbitration or litigation may more fully resolve all

disputes arising out of the termination of a construction contract, that is no justification for dismissing adjudication as being wholly inapplicable even when the contractor has a valid payment claim within the meaning of s 5 of the CIPAA.

[68] It can be said that Parliament appreciates the interim finality of an adjudication decision for it is provided in s 13(c) that the decision is binding unless the dispute is finally decided by arbitration or the court.

[69] Likewise it is expressly provided in s 37 of the CIPAA the proper relationship between adjudication and arbitration or court litigation as follows:

> 37 Relationship Between Adjudication and Other Dispute Resolution Process
>
> (1) A dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court.
>
> (2) Subject to subsection (3), a reference to arbitration or the court in respect of a dispute which is being adjudicated shall not bring the adjudication proceedings to an end nor affect the adjudication proceedings.
>
> (3) An adjudication proceeding is terminated if the dispute being adjudicated is settled by agreement in writing between the parties or decided by arbitration or the court.

[70] It cannot be seriously stated that arbitration is a speedy mode of resolving resolution; it is anything but speedy. In jurisdictions like ours where the courts are efficient with a target date of disposal of cases within nine months of date of filing of the writ, litigation has become the preferred mode of dispute resolution as compared to arbitration with parties in some cases, even conceding and consenting to litigation in spite of an arbitration clause in the contract. Many would say, with tongue in cheek, that it is faster and less expensive and with more grounds to canvass on appeal if one is dissatisfied with the court's decision.

[71] The claimant is not confined to pursuing its claim in arbitration only, but can have recourse to adjudication, being an additional dispute resolution mechanism introduced by the CIPAA. It is certainly not precluded from availing itself of adjudication under the CIPAA for so long as it has a valid payment claim against the non-paying party.

[72] In *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd* [2016] MLJU 1051; [2017] 1 CLJ 101 at pp 119–120, para 76, the argument raised was that any dispute with respect to an architect's fees has to be referred to arbitration as provided for under s 7A of the Architects Act 1967 and r 23 of the Architects Rules 1996 and not to adjudication under the CIPAA. The High Court observed as follows:

A [76] I agree that the dispute resolution mechanism under CIPAA is by way of adjudication and the statutory requirement for dispute resolution under the Architects Act is by way of arbitration. I must also state that there is nothing strange in this difference as statutory adjudication came into being only with the coming into force of CIPAA on 10 April 2014 and that there is no need to see adjudication and arbitration to be mutually exclusive of each other as *adjudication would only yield a decision of temporary finality and it is only with arbitration or litigation that one gets a final and binding decision. The whole scheme of statutory adjudication was never intended to be set in opposition to arbitration or litigation. Adjudication operates independently on a separate track and indeed a fast track and it will not run into collision with arbitration or litigation simply because its track is different.* Before there was adjudication, there were already arbitration and litigation. After the introduction of adjudication, both arbitration and litigation will still continue except that now there is an additional dispute resolution mechanism of temporary finality that can be embarked upon before or concurrently with arbitration or litigation as the case may be. Thus one need not have to choose in an 'either or' approach between adjudication and arbitration but one can proceed in a 'both and' approach in resolving a dispute on an architect's claim against his client for his professional fees. *Adjudication under CIPAA was never designed to be in conflict with arbitration and litigation and so its process may be activated at any time when there is a valid payment claim under a construction contract.* Premised on that proper perspective, the question of which would prevail over the other does not arise at all. (Emphasis added.)

[73] I would hold that the adjudicator has jurisdiction to decide the dispute even though the contract has been terminated.

Whether there has been a breach of natural justice when the adjudicator did not allow an extension of time for the respondent to serve a payment response

[74] The rules of natural justice are two-fold: (a) an affected person has the right to prior notice and an affective *opportunity* to make presentations before a decision is made; and (b) affected person has the right to an unbiased tribunal.

[75] See the English Court of Appeal decision of *Amec Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 1418 at p 7, para 14.

[76] In this case, only the first limb — ie *opportunity* to be heard — is relevant. As such, the complainant has to show any of the following:

(a) that he was prevented from tendering evidence or making submissions. See the Court of Appeal decision of *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLJU 1776 at pp 10–11, paras 19–20; and

(b) that the adjudicator decided the case on a basis not argued by either party, and without giving them a prior opportunity to comment on the 'new' basis.

See decision of his court in *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case* [2017] 7 MLJ 732 at p 771; [2016] 5 CLJ 882 at p 921, para 90(e).

[77] There is no breach of natural justice where an adjudicator declines to consider evidence which — on *his* analysis of the law — is irrelevant.

[78] See the English High Court decision of *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWHC 778 at para 81(1).

[79] The respondent contended that there was a breach of natural justice because the adjudicator refused to allow the respondent's application for extension of time to submit a payment response. Surely that is not what a breach of natural justice is.

[80] The application of natural justice does not require the adjudicator to decide an issue in a particular manner. All that natural justice requires is that the adjudicator should hear both sides and come to a determination on the issue. The fact that he has made a decision favouring one party and not the other party is no justification that he has breached natural justice.

[81] The respondent was certainly not prevented from making its application. On the contrary, the application was submitted and arguments thereon were ventilated before the adjudicator as can be seen in the exchange of correspondence in encl 2, pp 352–394.

[82] The claimant marshaled the argument before the adjudicator that: (a) the extension of time sought by the respondent was intended to extend the adjudicator's jurisdiction to the set off/counterclaim raised by the respondent; and (b) the only way in which such jurisdiction can only be extended by mutual agreement in writing of the parties as provided for under s 27(2) of the CIPAA.

[83] Since there was no such agreement in writing to extend the jurisdiction of the adjudicator the application was not allowed. See the adjudication decision in encl 2, p 642 (para 13.3.8) and p 644 (paras 13.3.22 and 13.3.23).

[84] Therefore the adjudicator declined to consider the set off/counterclaim that had not been raised in any payment response. as stated by this court on many an occasion, the adjudicator's jurisdiction is conferred by and confined to the matters raised in s 5 payment claim and s 6 payment response as provided

for under s 27(1) of the CIPAA. See the case of *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2016] 7 MLJcon 119; [2015] 4 AMR 565 at paras 11–13 and the case of *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd* [2015] MLJU 695 at paras 60–64.

[85] The Court of Appeal in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2016] 6 MLJ 717; [2017] 1 CLJ 677 at paras 17 and 18 is even more explicit on the consequences of not meeting the deadline for the service of a payment response as follows:

> 17. In dealing with ss 5 and 6, s 26 of CIPAA 2012 that pave way for the adjudicator to deal with issues relating to time limit, form or content, etc that is to say, any irregularity and/or non-compliance of the provision of ss 5 and 6 do not mean that the adjudicator will not have jurisdiction to hear the dispute. Non-compliance if any, can be remedied and/or condone by the adjudicator as set out in the section.
>
> 18. The second stage is related to adjudication claim and response. It is a strict requirement under s 5 of the CIPAA that the unpaid party may refer to dispute arising from a payment claim under s 5. Why we say it is a strict requirement is that the law provides for parties to extend the adjudicator's jurisdiction only in writing and in consequent the unpaid party cannot unilaterally extend the scope of its claim. *Equally the non-paying party also cannot extend the scope of its defence for adjudicator's consideration without a written agreement between the parties as set out in s 27(2). There time frame set out in ss 5, 6, 9, 16 etc (subject to* s 26) need to be strictly complied with, failing which the parties will not be able to benefit from the statutory rights provided in the CIPAA 2012. (Emphasis added.)

[86] I would agree with the approach taken by the said adjudicator after analysing the legal arguments raised by both parties before him. That I must say, cannot be a breach of natural justice even if a wrong decision has been arrived at.

[87] In this case I must say that I am in agreement with the arguments of the claimant in objecting to the extension of time for the respondent to serve a payment response out of time and the adjudicator's analysis of the arguments presented. The adjudicator had stated succinctly as follows in his decision:

> 13.3.22 In further consideration of the submissions of both parties, I find that there is no agreement in writing between the parties pursuant to section 27(2) CIPAA to extend the jurisdiction of the Tribunal to extend the time for submission of the Payment Response. On the contrary, the Claimant objected to the Respondent's application. Furthermore, there is no submission on legal authority that specifically allows an adjudicator to enlarge his own jurisdiction by allowing time for the serving of the Payment Response.

[88] It is doubtful if an adjudicator has the power to extend the time for service of a payment response as this was a matter to be complied with and served before his appointment as an adjudicator. His power to extend time

under s 26 of the CIPAA must be over matters in which he has the jurisdiction under s 27 of the CIPAA. If he has no jurisdiction over a matter because no payment response was filed, he cannot have the power to extend time to enable him to have jurisdiction over such a matter.

[89] A closer scrutiny of s 26(2) of the CIPAA reveals that the non-compliance in respect of time, form or content or in any other respect is in relation to 'the adjudication proceedings ...'. Under s 8(1) of the CIPAA an adjudication proceeding is initiated by the service by a claimant by a written notice of adjudication. Until then no adjudication proceedings have begun.

[90] At any rate even if the adjudicator has the power to extend the time for service of the payment response, he had in this case, not been persuaded that there are cogent grounds for an extension of time.

[91] Learned counsel for the respondent submitted that the adjudicator failed to appreciate that the reason in why the respondent did not issue its payment response within the statutory time limit, setting out its claims for liquidated damages, defective works and other claims was due to the execution of the settlement agreement dated 18 July 2016 between the claimant and the respondent. It was further impressed upon the adjudicator that only after the claimant had reneged on the agreement dated 18 July 2016, which was after the due date for the service of the payment response, that the respondent was compelled to make an application for an extension of time to issue its payment response.

[92] If indeed the so-called handwritten notation was to have resulted in the claimant not proceeding with the adjudication, then one would have expected that to be referred to in the handwritten notation.

[93] Alternatively as there were seven more days after the conclusion of the handwritten agreement for the payment response to be filed, one would have expected the payment response to simply state that no payments are due on the three certificates Nos 14, 15 and 16 as the time of payments had been postponed and that with those payments at the postponed dates, the parties had no further claims against each other.

[94] The handwritten is strangely silent on these if indeed the terms of the so-called agreement involved the withdrawal of the adjudication proceedings.

[95] It cannot escape one's notice that the notice of adjudication dated 5 August 2016 was served on the respondent on 8 August 2016. It was only on 26 October 2016 that the respondent's solicitors wrote to the Director of KLRCA giving notice that there was an issue of jurisdiction that merit

consideration on whether CIPAA applies as the contract has been terminated. The said solicitors also requested for an extension of time of seven days to file an adjudication response. The adjudicator duly extended time to file the adjudication response to 4 November 2016 in the exercise of his powers under s 25(p) of the CIPAA.

[96] It was only very late in the day on 4 November 2016 that the respondent applied to the adjudicator to serve its payment response out of time. If indeed the claimant had stolen a march on the respondent as contended by the service of the notice to adjudicate, then one would have thought that any application for extension of time, if that is possible, would have been applied for much earlier. Clearly when applying for extension of time to file its adjudication response on 26 October 2016 the respondent's solicitors did not see any problem with the non-filing of the respondent's payment response. The fact that the respondent is not familiar with adjudication is not an acceptable reason for not filing the payment response. As the old adage goes, the court must proceed from the premise that everyone knows the law and that ignorance of the law is no good excuse.

[97] The court should restrain itself from interfering with the exercise of discretion given by Parliament to an adjudicator to decide on extension of time unless it has been shown that such a decision is grossly unfair or perverse in the circumstances of the case.

Whether the adjudicator has failed to act independently or impartially under s 15(c) of the CIPAA

[98] The respondent alleged in passing that the adjudicator had failed to act independently or impartially merely because he refused the respondent's said application.

[99] It would be most unfair for the respondent to level such an accusation against an adjudicator merely because the respondent disagreed with the adjudicator and strongly believed that the adjudicator's decision is wrong in law.

[100] Unless there is cogent and convincing evidence of such lack of independence or impartiality, this court would not venture into accusations of this nature where it is easy to allege but with no evidence raised to point in that direction other than the respondent's failure to understand how the adjudicator could have disagreed with the stand that learned counsel for the respondent had taken.

[101] The adjudicator would have no opportunity to defend himself other than his grounds given in his adjudication decision and based in those grounds, I detect not the slightest trace of any lack of independence or impartiality.

[102] This is a case where the proper course for the losing party in the adjudication is to pay the amounts ordered by the adjudicator and to proceed to arbitration for a final decision by way of an arbitral award. Challenging the adjudicator's decision is likely to lead to a substantial waste of time and expense as was held by the English Court of Appeal decision of *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358 at paras 85–87 as follows:

> 85. The objective which underlies the Act and the statutory scheme requires the Courts to respect and enforce the adjudicator's decision *unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair.* It should only be in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which (contrary to the DML's outline submissions, to which we have referred in paragraph 66 of this judgment) may, indeed aptly be described as 'simply scrabbling around to find some argument, however tenuous, to resist payment.
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> 86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels of 'excess of jurisdiction? or 'breach of natural justice?. It must be kept in mind that the majority of the adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his subcontractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting legitimate cash-flow requirements of contractors and their subcontractors. *The need to have the 'right' answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions.* Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present.
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> 87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. *If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position*. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a

A substantial waste of time and expense — as, we suspect, the costs incurred in the present case will demonstrate only too clearly. (Emphasis added.)

PRONOUNCEMENT

B **[103]** For the reasons given above I had dismissed JPS's application to set aside the adjudication decision and correspondingly I had allowed Binastra's application to enforce the adjudication decision. As both applications were heard together, I ordered a single costs of RM10,000 to be paid to Binastra.

C *JPS's application dismissed; Binastra's application allowed with cost of RM10,000 to be paid to Binastra.*

Reported by Kamarul Anwar

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